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IN THE

Supreme Court of the United States

No. ____

OCTOBER TERM, 1971

BENNIE EDWARD DANNER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on the 12th day of May, 1971, dismissing Petitioner's appeal as of right and overruling Petitioner's motion for leave to appeal.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court overruling the motion to quash the search warrant and suppress evidence is unreported and is printed in the Appendix *infra* p. 28. The opinion of the Franklin County Court of Appeals affirming the convictions is unreported and is printed in the Appendix *infra* p. 22. No opinion was rendered by the Supreme Court of Ohio. The dismissal of the appeal as of right is reported XLIV Ohio Bar No. 20, p. 626 and printed in the Appendix *infra* p. 21. The overruling of the motion for leave to appeal is reported XLIV Ohio Bar No. 20, p. 627 and printed in the Appendix *infra* p. 21.

JURISDICTION

The dismissal of Petitioner's appeal as of right and the overruling of Petitioner's motion for leave to appeal were both entered by the Supreme Court of Ohio, the highest state court in which a decision could be had, on May 12, 1971. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the Ohio courts should be permitted to apply standards for determining the adequacy of an affidavit submitted in order to obtain a search warrant which are in conflict with the standards developed by this Court in *Aguilar v. Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964) and *Spinelli v. United States*, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), because the standards applied by the Ohio Courts do not require that the affidavit satisfy either the *Aguilar* test or the alternative test of equal reliability developed in *Spinelli*.

2. Whether under the Fourth Amendment to the Constitution of the United States defects in an affidavit used to obtain a search warrant may be "cured" by additional statements by police officers to the magistrate at the time the search warrant was issued when the statements were unsworn, *no record was made of the statements either at that time or at any subsequent time,* the contents of the statements are unknown, *and there has been no showing that the statements contained any facts that would have cured the defects in the affidavit if they had been made part of the affidavit.*

3. Whether the trial court violated the defendant's rights under the Fifth Amendment to the Constitution of the United States by drawing the jury's attention to

the defendant's failure to testify by means of an unexpected and unrequested "cautionary" instruction.

4. Whether the Ohio courts violated the defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States by convicting him of crimes without any evidence of his guilt.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Ohio statutes regulating search warrants (O.R.C. Sec. 2933.23 and 2933.24), the Ohio narcotics statutes which Petitioner was convicted of violating (O.R.C. Sec. 3719.09, 3719.101 and 3719.20 (H)) and of the Ohio statute under which Petitioner was sentenced (O.R.C. Sec. 3719.99) and of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix *infra* p. 33.

STATEMENT OF THE CASE

This is an appeal from a conviction on three charges of violation of Ohio's narcotics laws—permitting the use of a dwelling for the illegal keeping of narcotic drugs (Ohio Revised Code Section 3719.101), possession of narcotic drugs (Ohio Revised Code Section 3719.09), and conspiracy to possess narcotic drugs (Ohio Revised Code Section 3719.20 (H)).

All charges grew out of a search of a residence in Columbus, Ohio made by members of the Columbus, Ohio Police Department on January 13, 1969.

Petitioner moved both in the Franklin County Municipal Court during the preliminary hearing and in a pretrial motion in the Franklin County Court of Common Pleas to quash the search warrant allegedly used for the search and to suppress evidence. In both courts

Petitioner argued that the affidavit used to obtain the search warrant was inadequate to show probable cause and that the search was illegal under both Ohio law and the Fourth and Fourteenth Amendments to the Constitution of the United States. Petitioner continued to raise this Constitutional issue by objections to the admission of evidence during the trial and in his Brief and Assignments of Error in the Franklin County Court of Appeals and in his Memorandum In Support of Jurisdiction in the Supreme Court of Ohio.

Petitioner also argued in his pre-trial motion that the search was made without the search warrant and prior to the time the search warrant was issued. This issue involved a factual dispute which the trial court decided against Petitioner and Petitioner cannot and does not raise that issue in this Court. During the hearing on this issue, however, the magistrate who issued the warrant, Judge James A. Pearson of the Franklin County Municipal Court, was called as a witness by Petitioner's own counsel in an attempt to discover the time when the search warrant was issued. Judge Pearson testified that the police officers had come to his home seeking a search warrant and that he had prepared the affidavit from information given him by the officers and had personally typed the affidavit and warrant. Judge Pearson had brought with him to the hearing some notes to which he referred while testifying. Judge Pearson explained that he had made these notes on the night he signed the search warrant and that he made some notes because the officers told him some things that were not in the search warrant. Judge Pearson did not say what these things were or give any indication that he had relied upon them in issuing the search warrant. No evidence was introduced either through Judge Pearson or through any other witness

that the police officers had told Judge Pearson anything that would support a finding of probable cause that was not made a part of the affidavit. No evidence was introduced that the police officers had told anything to Judge Pearson under oath.

The trial court overruled the motion to quash the search warrant and suppress evidence on the grounds that the affidavit was adequate to show probable cause.

In its Answer Brief in the Franklin County Court of Appeals the State raised for the first time an argument that the search warrant might be upheld even if the affidavit were inadequate on the basis of the possibility that the issuing magistrate might have been told something in addition to the facts stated in the affidavit. Petitioner responded in his reply brief that the suggested procedure was illegal under the law of Ohio and invalid under the Constitution of the United States. Two federal constitutional issues were raised. First, the conversations of the police officers with the judge were not under oath or by affirmation and therefore could not satisfy the constitutional requirement that probable cause be shown only under oath or by affirmation. Secondly, the procedures suggested by the State's supplementation argument would deny adequate enforcement to the Fourth Amendment. The same federal constitutional arguments were presented to the Supreme Court of Ohio.

The Franklin County Court of Appeals upheld the validity of the search warrant in an opinion which combined a discussion of the allegations of the affidavit with statements that the magistrate could and had received information outside the affidavit and apparently relied upon both to find that there was probable cause for the warrant.

There is no indication either in the record or outside

of it that Judge Pearson actually did receive any additional information which, if properly sworn or affirmed, would have supported a finding of probable cause. The prosecuting attorney asked no questions concerning additional information given the magistrate. The prosecuting attorney did ask some questions concerning whether any additional information was known to the officer-affiant. Defense counsel did object to those questions. (Transcript pp. 16-26) but were almost invariably overruled and the officer-affiant's answers are in the record. (Transcript pp. 16-26) They do not indicate that any additional information even existed which would have shown probable cause if properly presented to the magistrate.

At the conclusion of the trial while charging the jury the trial judge drew the attention of the jury to the fact that Petitioner had not taken the stand by instructing them that the Petitioner had a constitutional right not to testify and that they should not consider the fact that he had not testified for any purpose. Petitioner's counsel had not requested, did not want, and did not expect such an instruction. The instruction was objected to as a violation of Petitioner's constitutional right not to testify and this constitutional argument was presented to the Franklin Couny Court of Appeals and the Supreme Court of Ohio.

The evidence presented by the State at trial consisted of what the officers saw and found when they broke into and searched the Columbus, Ohio residence on January 13, 1969. They did not find any evidence of the large narcotics ring described in the affidavit. In the front room of the basement they found indications of a party —fried chicken, drink cans and the like, five persons, and two-thirds (⅔) of an ounce of heroin and a pinch of

cocaine too small to weigh. Narcotics instruments were found on some of the persons and in the room. The Petitioner was not one of the five persons in the room. Something less than two cigarettes of marijuana were found hidden in a night stand in the front bedroom. There was no evidence that the Petitioner knew of the narcotics, possessed them, had done anything to help with them or had made any agreement concerning them. Petitioner moved for directed verdicts on all three charges after both the State's case and his own. In both the Franklin County Court of Appeals and the Supreme Court of Ohio, Petitioner argued the complete absence of evidence to support any of the convictions.

REASONS FOR GRANTING THE WRIT

1. The Ohio courts upheld the affidavit used to obtain the search warrant by applying standards in conflict with those developed by this Court in AGUILAR and SPINELLI and this Court should grant the writ both in order to enforce the standards developed in AGUILAR and SPINELLI and to clarify those standards for the lower courts.

In *Spinelli v. United States*, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, this Court held that when an affidavit used to obtain a search warrant relies upon hearsay statements of informants, the hearsay statements must either meet the two-pronged test of *Aguilar v. Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, or be so well supported or corroborated by other non-hearsay facts in the affidavit as to be as trustworthy as statements that do pass the *Aguilar* test.

Two aspects of these standards developed in *Aguilar* and *Spinelli* are important in the present case. First the standards require that a showing be made from which the magistrate himself and not the police officer-affiant can determine that probable cause exists. Secondly, these standards require that the showing consist of something more substantial than rumor or general reputation. In *Spinelli* this court stated:

> ". . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (393 U. S. 410, at 416, 21 L. Ed. 2d 637, at 644.)

In the present case, however, the courts of Ohio have applied standards which would permit a search warrant to be based upon precisely this sort of "casual rumor circulating in the underworld" or accusations based on "general reputation" and which would permit the police officer himself to determine the adequacy of these rumors. The Ohio courts do not, of course, deny the authority of this Court to set standards, but they have treated the search warrant question with so "broad a brush" that the standards developed by this Court disappear and are not applied.

The affidavit in this case stated:

> "The facts upon which such belief is based are as follows: this residence is occupied by Benny Danner, who has a prior narcotic conviction, and at least six reliable informats [sic] have informed Officers Dempsey and Weatherman that Mr. Danner is selling narcotics from this residence and is the largest dealer in narcotics in this area. These Officers have seen automobiles belonging to A. C. Russell, Al Smith, Leroy Cook, Ernest Lee Felder in this immediate vicinity this evening, and reliable informants have informed this affiant that these persons are selling narcotics for Benny Danner. A neighbor of Mr. Danner has informed Officer Weatherman that persons were frequenting the premises in automobiles which checked out to be owned by known narcotic users or pushers. Some of these same outomobiles [sic] were in front of this residence at 8:30 P.M. this date.
>
> /s/ James Dempsey"

This affidavit is dependent upon the hearsay accusations of the unnamed informants to show any reason to search these premises for narcotics. It must therefore either satisfy the two-pronged *Aguilar* test or the alternative weighing of *Spinelli.*

This affidavit was not intended to satisfy and does not satisfy the two-pronged test of *Aguilar*. That test first requires that the affidavit set forth some facts from which the issuing magistrate himself can determine the informants' reliability. In this affidavit the officer called the unnamed informants "reliable" but he "offered the magistrate no reason in support of this conclusion." (*Spinelli v. United States*, 393 U. S. 410, at 416, 21 L. Ed. 2d 637, at 643). Similarly, there was no attempt to comply with the second prong of the *Aguilar* test. There was no explanation of the basis or bases for the accusations made by the informants.

Therefore under the *Spinelli* standards, the question which the Ohio courts should have faced was whether the hearsay statements reported by the officer-affiant were so supported or corroborated as to be as reliable as hearsay statements that did meet the *Aguilar* test. Instead the Ohio courts applied standards which do not distinguish between a reliable "tip" and "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The highest Ohio Court to render an opinion was the Franklin County Court of Appeals. In its opinion the Court of Appeals refused to give any weight to one glaring weakness in the affidavit—the absence of any indication as to when in the past the "tips" relied upon by the affiant were received. Without that information neither the magistrate nor any reviewing court can determine the freshness and timeliness of the information. That defect alone should have required that the application for a search warrant be denied. *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir., 1966); *Bruce v. Commonwealth*, 418 S. W. 2d 645 (Ky., 1967); and Annotation, "Search warrant: sufficiency of showing as to time

of occurrence of facts relied upon," 100 A.L.R. 2d 526. Certainly it should at least have been weighed in determining whether these "tips" were as reliable as those that meet the *Aguilar* test.

The Franklin County Court of Appeals seemed to give four reasons for holding the affidavit adequate. One dealt with the possibility that the affidavit might have been supplemented by additional information which was not made part of any record and will be discussed separately. The other three factors said to make the affidavit adequate were: one, the affiant claimed to have received tips from " *at least*" six reliable informants, two, the judge was informed of a prior narcotics conviction, and three, automobiles of accused persons had been seen by officers and a neighbor in the area.

None of these factors provide any protection against the possibility that "informants" are merely repeating rumors. Indeed a story told by "*at least*" six persons seems far more likely to be a rumor than "inside information." Perhaps there are circumstances in which two detailed stories might corroborate each other, but the bare bones accusations credited to "*at least*" six informants and to another unstated number of informants in this affidavit should not gain any reliability merely by being repeated.

The conviction does nothing to change the possibility that the accusations are casual rumors, and if it is entitled to any weight at all it is inadequate to provide the needed corroboration.

The fact that persons who are the subjects of the accusations are associating together is an "innocent seeming activity and data" that does not provide any confirmation of the accusations against them. Once again while verification of innocent data might be carried so far as to

constitute corroboration as in *Draper v. United States*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959) the bare bones fact that some accused individuals associate with each other is not such a corroboration.

The standards applied by the Court of Appeals in order to uphold the affidavit undercut and destroy the standards developed by this Court in *Aguilar* and *Spinelli*. This Court should grant the writ in order to enforce and clarify those standards.

2. The Court should grant the writ in order to determine whether the Fourth and Fourteenth Amendments require the states to provide effective procedures for the recording and review of the grounds on which search warrants are issued. Petitioner contends that effective procedures would prohibit supplementation of search warrant affidavits. In the alternative, Petitioner contends that such supplementation must be limited to official, contemporaneous records. Finally, Petitioner contends that as a minimum, material used to supplement an affidavit must be at least made a part of the record in the reviewing court.

Petitioner contends that the Fourth and Fourteenth Amendments require the states to provide effective procedures for the recording and review of the grounds on which search warrants are issued since the absence of such procedures will effectively destroy the rights guaranteed by those Amendments. The present case provides an opportunity for the Court to consider three alternative requirements for such effective procedures all of which were violated when the Franklin County Court of Appeals held that the search warrant could be upheld on the basis of unsworn, unrecorded, and still unknown oral statements made to the magistrate at the time he issued the search warrant. First, Petitioner contends that

the states must require that the facts used to obtain a search warrant be presented and preserved in a single affidavit or package of affidavits. Secondly and alternatively Petitioner contends that the states must require an official contemporaneous record of the facts on the basis of which a search warrant is granted. Finally Petitioner contends that the very least that the constitution requires is that the issuance of search warrants be upheld only on the basis of facts that have been made matters of public record.

The first requirement, that the facts showing probable cause should be set out in a single affidavit or package of affidavits, is necessary in order to enable a defendant to discover and prove what happened at the *ex parte* hearing at which the search warrant was issued. While such a requirement would place very little burden on the State, the absence of such a requirement compels the defendant to struggle with an unseen hydra headed monster of possible supplementation.

Such a requirement seems especially appropriate when, as in the present case, the search warrant (which is on a standard Ohio form) purports to be based exclusively upon the affidavit which is made a part of it and gives no indication that it was issued on the basis of any other allegations or any indication as to how those other allegations may be discovered.

Counsel for Petitioner had supposed that this requirement was the law of Ohio. Sections 2933.23 and 2933.24 of the Ohio Revised Code set forth a careful plan for the issuance of search warrants on the basis of affidavits and provides that a copy of the affidavit or of all the material facts in the affidavit shall be included in the search warrant. These sections had been interpreted as meaning that ". . . the affidavit must be self-sufficient in the mat-

ter of probable cause, and cannot be bolstered by oral testimony." *City of Cleveland Heights v. Spellman*, 34 Ohio Op. 2d 405, 213 N. E. 2d 206 (Cleveland Heights Municipal Court, 1965).

In *State v. Joseph*, 25 Ohio St. 2d 95 (1971) the Supreme Court of Ohio stated for the first time (in dicta) that information presented to the magistrate in addition to the affidavit might be considered in issuing and in reviewing the issuance of the search warrant. 25 Ohio St. 2d 95, at 97. In the present case the Court of Appeals of Franklin County held that the portion of Section 2933.23 Ohio Revised Code providing that the magistrate might demand "other and further evidence" meant that the magistrate could issue a search warrant on the basis of evidence that was not made a part of any affidavit. As a result of the *Joseph* case and the present case a serious weakness has been introduced into the Ohio affidavit-search warrant procedure. Petitioner respectfully suggests that Ohio is required by the Fourth and Fourteenth Amendments to provide a stronger, effective single affidavit or group of affidavits procedure.

Secondly and alternatively, Petitioner contends that the Fourth and Fourteenth Amendments require the states to provide procedures under which an official contemporaneous record is made of facts relied upon to show probable cause for the issuance of a search warrant.

In *Christofferson v. Washington*, 393 U. S. 1090, 23 L. Ed. 2d 234, 89 S. Ct. 855 (1969), Mr. Justice Brennan dissented from the denial of certiorari in such a case in an opinion in which Mr. Justice Marshall joined. In that opinion Mr. Justice Brennan stated:

> ". . . The substantive right created by the requirement of probable cause is hardly accorded full sweep without an effective procedural means of assuring

meaningful review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right. . ."

Mr. Justice Brennan concluded in that case:

"It seems to me that there is a substantial constitutional issue presented by the question tendered by petitioner.

I would therefore grant the petition."

Thirdly, Petitioner contends that at a minimum the Fourth and Fourteenth Amendments prohibit a procedure under which the issuance of a search warrant is upheld on the basis of conversations between the police officers and the magistrate whose contents remain completely unknown. In the present case no public record has ever been made of the contents of the conversations between the police officers and the magistrate. Neither the courts below nor defense counsel have any information as to what was said. The record does not even indicate that the magistrate relied upon anything in the conversations and certainly does not indicate that the conversations contained any information that would support a finding of probable cause. The Court of Appeals of Franklin County, nevertheless, assumed that the conversations included factual information which the magistrate failed to include when he himself prepared and typed the affidavit, and went on to assume that these unknown and unreviewable facts would help to support a finding of probable cause.

3. This Court should grant certiorari in order to decide the important question of whether the rule announced by this Court in GRIFFIN V. CALIFORNIA, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965), that the Fourteenth Amendment prohibits adverse comment by a prosecutor or trial judge upon a defendant's

failure to testify applies to statements which draw the jury's attention to the defendant's failure to testify while purporting to caution them against giving any consideration to that fact.

The courts below held that despite the fact that under *Griffin* it would have been a violation of the Petitioner's Fifth Amendment rights for the trial court to have directed the jury's attention to the fact that Petitioner had not taken the stand if the trial court told the jury that they could consider that fact, nevertheless, it was proper for the trial court to direct the jury's attention to the fact that Petitioner had not taken the stand so long as the trial court gave the jury a cautionary instruction that they were not to consider that fact. The Franklin County Court of Appeals held that since the cautionary instruction was "a correct statement of the law" it could properly be given despite the fact that Petitioner had not requested it, did not want it, and did not know it was going to be given.

Petitioner respectfully suggests that this holding is based upon a totally unrealistic view of the effect of cautionary instructions not to consider a defendant's failure to take the stand. Once the jury's attention is drawn to the defendant's failure to take the stand a cautionary instruction will not undo the damage. The Supreme Court of Ohio has itself recognized that cautionary instructions to the jury by the court after the prosecutor has commented on failure by the defendant to testify cannot undo the damage in such cases. *State v. Davis*, 10 Ohio St. 2d 136 (1967); *State v. Minamyer*, 12 Ohio St. 2d 67 (1967).

The Court of Appeals of Kentucky put the point very well in *Tines v. Commonwealth*, 77 S. W. 362, 364 (1903)

". . . the jury were instructed 'that they shall not

> comment upon the failure of the defendant to testify; neither shall they draw any presumption of his guilt from his failure to testify.' The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the commonwealth's attorney could have been more injurious to his interest than was done by this instruction. The court, by the instruction in question, did appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf . . ."

Accord: Patman v. State, 247 P. 2d 308 (Criminal Court of Appeals, Oklahoma, 1952); *Glenn v. State*, 375 P. 2d 281 (Court of Criminal Appeals, Oklahoma, 1962); *McLaughlin v. State*, 169 P. 657 (Criminal Court of Appeals, Oklahoma, 1918).

Some states have gone so far as to hold that their no comment statutes mean no comment even when the defendant himself requests an instruction such as the trial court gave in the present case. *State v. Barker*, 399 S. W. 2d 1 (Supreme Court of Missouri, Division 2, 1966); *Kinney v. State*, 36 Wyo. 466, 256 P. 1040 (1927); *State v. Pearce*, 56 Minn. 226, 57 N.W. 652 (1894).

Regardless of whether or not this Court agrees with Petitioner's position on this question, the question itself is an important one and commonly recurring at the trial level which should be settled by this Court.

4. This Court should grant certiorari in order to enforce its decision in THOMPSON V. LOUISVILLE, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960), that the due process clause of the Fourteenth Amendment requires that no person be convicted without evidence of his guilt.

There are some offenses that are so abhorrent to both

courts and juries that defendants charged with them may be convicted despite a complete absence of evidence to support the charge. Both brutal murders and offenses involving narcotics are likely to cause such a response. In the present case the petitioner was convicted of three serious narcotics offenses despite the fact that the state did not undertake to prove the elements of any of them.

The petitioner was present along with numerous other people in a house where narcotics were found, but the offenses involved in this appeal go far beyond mere presence. The petitioner is appealing from convictions on charges of (1) knowingly permitting the use of a dwelling owned or controlled by him for the keeping of narcotic drugs (2) possession of narcotics and (3) conspiracy to possess narcotics.

Under Ohio law, in order to convict the petitioner of permitting the use of a dwelling it was necessary for the state to show that he *owned or controlled* the dwelling *and* that he *knowingly permitted* narcotics to be kept there. *State v. Tabasko*, 22 Ohio St. 2d 36, 41-42 (1970).

The state made no attempt to prove that petitioner owned or controlled the premises in question. Instead it was admitted that the owner was a Mary Owens (R. 190) and the state contented itself with attempting to prove that the petitioner sometimes lived at these premises—as did several of the persons found on the premises at the time of the raid.

The state made no attempt to show that the petitioner had any knowledge of the existence of the narcotics or that he had done anything to permit them to be kept on the premises. Narcotics were found in two places. Something less than two cigarettes of marijuana were hidden in a night stand in a bedroom. There was no evidence as to how long it had been hidden or that petitioner had

known of its existence. The only other narcotics were small amounts of heroin and cocaine on a table in the front room of the basement. Five other persons were present in that room when the police entered and discovered those narcotics. The petitioner was not one of those persons. There was no evidence that these narcotics had been in sight at any time when the petitioner had been in that room or that the petitioner had been informed of the existence of the narcotics.

Similarly, the state failed to produce any evidence in support of the possession charge that the petitioner either controlled or knew of the existence of the narcotics.

The conspiracy charge is an extremely serious charge under Ohio law for it not only carries a sentence of ten to twenty years imprisonment but is also the only narcotics offense under Ohio law for which probation is forbidden even for a first offense. Ohio Revised Code Sections 3719.20 (H) and 3719.99 (D) and (N) (1969 and subsequent supplements). There was no evidence to support this serious charge. The indictment charged that all eight of the nine adults present anywhere in the house when the raid was made were parties to a conspiracy to possess the approximately two-thirds (⅔) of an ounce of heroin and cocaine and the less than two cigarettes of marijuana found in the house. There was no evidence that any of these persons had in fact entered into any agreement concerning those narcotics and there was certainly no evidence that this petitioner was a party to any such agreement. Compare. *Wood v. United States*, 283 F. 2d 4 (5th Cir., 1960) and *Harms v. United States*, 272 F. 2d 478 (4th Cir., 1969). Evidence that the petitioner associated with others some of whom possessed and intended to use narcotics is not evidence of a conspiracy. *Wood v. United States, supra; Evans v. United*

States, 257 F. 2d 121 (9th Cir., 1958); and *Ong Way Jong v. United States*, 245 F. 2d 392 (9th Cir., 1957). A conspiracy conviction must at least be supported by evidence that the defendant possessed the knowledge necessary in order to participate in a conspiracy. *Ingram v. United States*, 360 U. S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314 (1959); *Miller v. United States*, 382 F. 2d 583 (9th Cir., 1967); *United States v. Fellabaum*, 408 F. 2d 220 (7th Cir., 1969); and *Evans v. United States*, 257 F. 2d 121 (9th Cir., 1958).

The petitioner was convicted despite the state's failure to present any evidence that a conspiracy actually existed or that petitioner had knowledge of the narcotics or that petitioner had done anything to further such a conspiracy.

Thus, as in *Thompson*, there is "no evidence whatever in the record to support these convictions", and the convictions are violations of due process. Therefore this Court should grant the writ in order to enforce the requirement of due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
ABRAHAM GERTNER AND
WALKER J. BLAKEY
Counsel for Petitioner.

APPENDIX

OPINIONS AND JUDGMENTS BELOW

ENTRY IN THE SUPREME COURT OF OHIO ON THE APPEAL FROM THE COURT OF APPEALS MAY 12, 1971

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

ENTRY IN THE SUPREME COURT OF OHIO ON THE MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS MAY 12, 1971

It is ordered by the Court that this motion is overruled.

ENTRY IN COURT OF APPEALS OF FRANKLIN COUNTY, OHIO FILED FEBRUARY 12, 1971

This cause came on for hearing on the appeal of the defendant, Bennie Edward Danner, through counsel of his judgment of conviction in the Court of Common Pleas of Franklin County for three (3) counts of narcotics violations.

This Court after full consideration of the Assignments of Error and briefs, the Bill of Exceptions and the transcript of the original papers and oral arguments by counsel on behalf of the parties finds there is no error apparent on the record or judgment prejudicial to the appellant.

Therefore, it is the order and judgment of this Court that the judgment of the Court of Common Pleas should be and it is hereby affirmed and that this cause is remanded to that Court for execution upon the judgment in accordance with law.

To all of which the appellant through his counsel excepts.

The court finds that the appeal bond previously set by the Court of Common Pleas is still in effect and is not affected by this order.

DECISION IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO RENDERED FEBRUARY 2, 1971

STRAUSBAUGH, J.

This is an appeal from conviction of defendant of three charges, permitting the use of a dwelling for the illegal keeping of narcotic drugs, possession of narcotic drugs, and conspiracy to possess narcotic drugs. The judgment is affirmed.

The charges grew out of a search made with a search warrant by members of the Columbus Police Department of defendant's residence, at which place and time defendant was arrested. Defendant's first assignment of error is that "The trial court erred in overruling the Motion to Quash the Search Warrant and suppress the evidence" for four reasons: (1) because the affidavit submitted to obtain the search warrant was inadequate to show probable cause; (2) because the affidavit did not allege the unnamed informants had either personal knowledge or some other sound basis for their accusations; (3) because the affidavit did not provide the magistrate with any facts with which to judge the informants' reliability; and (4) because the affidavit did not state either the dates to which the accusations referred or even the dates when the accusations were made.

The affidavit in *Akron v. Williams* (1963), 175 Ohio St. 186, is clearly distinguishable from the affidavit herein. In *Akron* the affiant merely swore that he had "personal knowledge, or knowledge from a reliable source that narcotic drugs are kept * * * on the premises * * *." No facts whatsoever were stated on which the alleged knowledge was based.

In *Aguilar v. Texas* (1964), 84 S. Ct. 1509, the affidavit recited that "Affiants have received reliable information from a credible person and do believe that * * * narcotics * * * are being kept at the above described premises * * *." The court, in holding that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause, said:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S. Ct. 825, was 'credible' or his information 'reliable.' "

In *Spinelli v. United States* (1969), 89 S. Ct. 584, the affidavit alleged in detail form that the FBI had kept track of Spinelli's movements on five days during the month of August 1965; that an apartment Spinelli was seen entering contained two telephones listed under a certain woman's name; that:

> "William Spinelli is known to this affiant and to federal law enforcement agents and local law en-

> forcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.
>
> "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones * * *."

In *Spinelli*, as in *Aguilar*, there was but one informant's tip. In *Spinelli*, the court said:

> "* * * This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. * * *"

In the instant case we have an informant's tip substantiated by the addition of "at least" five other "reliable informants [sic]." Furthermore the judge was informed that the defendant had "a prior narcotic *conviction*" (Emphasis added). In *Spinelli* the FBI made no statements that the defendant had ever been *convicted* of any gambling charge. There is further support found in the statement made in the affidavit herein that:

> "* * *These Officers have seen automobiles belonging to A. C. Russell, Al Smith, Leroy Cook, Ernest Lee Felder in this immediate vicinity this evening, and reliable informants have informed this affiant that these persons are selling narcotics for Benny Danner. A neighbor of Mr. Danner has informed Officer Weatherman that persons were frequenting the premises in automobiles which checked out to be owned by narcotic users or pushers. Some of these same automobiles were in front of this residence at 8:30 P.M. this date."

It is provided in R. C. 2933.23 that "The judge or magistrate may demand other and further evidence before issuing such warrants." At R. 32 we note in the testimony of the judge, referring to notes he had taken:

> "They were made on the night I signed the search warrant, or at the time I signed the search warrant while I was talking to the officers, I made some notes because they told me some things that weren't in the search warrant and I told them to make the notes and they told me about these things."

We find here that there was substantial basis for the judge to conclude that narcotics were probably present and that probable cause existed to support the warrant. As the court said in *Aguilar*, the judge "must judge for himself the persuasiveness of the facts relied on by the complaining officer to show probable cause." The court further reiterated in *Spinelli* that "The magistrate was obligated to render a judgment based upon a common sense reading of the entire affidavit."

Defendant's fourth complaint relating to the inadequacy of the affidavit because it did not state dates is not supported by a reading of the affidavit. The statements are made in the present tense and the statement relating to the automobiles even gives the exact time that evening when the automobiles were present in front of the residence.

Defendant's second, third and fourth assignments of error relate to the question whether the verdict of the jury and the conviction of defendant were supported by the weight of the evidence. A careful review of the record establishes that there was sufficient evidence to justify the jury's verdict. A reviewing court may not reverse a judgment of conviction in a criminal case in a trial court, where the record shows that a verdict of guilty was returned by the jury on sufficient evidence. *State v. DeHass* (1967), 10 Ohio St. 2d 230.

Defendant's fifth assignment of error is that the trial court erred in charging the jury on aiding and abetting

and raises the question whether there was sufficient evidence to justify the instruction. Defendant concedes that the court's instruction was a proper statement of the law. In reviewing the record we find that there was sufficient evidence to justify the instruction. There was evidence tending to establish that defendant was a resident of the house in question; that he was present in the basement area where the narcotics and the narcotics instruments were found; that he was wearing a houserobe and pajamas with $300 in his robe pocket; that when what appeared to be marijuana was found beside defendant's bed it was testified that defendant stated, "Oh, you wouldn't bust a guy for a little grass. Everybody's got some of that." (R. 191.) All of this plus other evidence is sufficient to justify the court in giving the instruction on aiding and abetting.

Defendant's sixth assignment of error is that the trial court erred in calling to the jury's attention the fact that the defendant had not testified. The court in connection with his charge regarding the jury's duty to determine credibility of witnesses said, "It is not necessary that the defendant take the witness stand in his own defense. In fact, he has a constitutional right not to testify. The fact that he did not testify must not be considered for any purpose." The United States Supreme Court in *Griffin v. California* (1965), 380 U. S. 616, "forbids comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt." The charge in this case is exactly opposite from the admonition by the Supreme Court and correctly states the law. We find no pronouncement by either the Supreme Courts of Ohio or the United States which states that a correct statement of the law in this area constitutes prejudicial

error. Assignments of error one through six are overruled. The judgment is affirmed.

Judgment affirmed.

TROOP, P. J. and WHITESIDE, J., concur.

ENTRY IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO FILED NOVEMBER 18, 1969

This day again came the Prosecuting Attorney, on behalf of The State of Ohio, the defendant being in Court in custody of the Sheriff, and being represented by Counsel, Abraham Gertner.

Thereupon being informed of the verdict of the Jury, "Guilty" as he stands charged in the Indictment in Counts #1, #4 & #5 and a Nolle Prosequi was entered as to Counts #2 & #3 and being inquired of, if he has anything to say why judgment should not be pronounced against him, and having nothing but what he has already said, it is the sentence of the Court that the defendant Benny Edward Danner pay the costs of this prosecution and a jury fee of $195.00, for which execution is awarded, and be imprisoned in the Ohio Penitentiary and kept at hard labor but without solitary confinement for the term provided by law, and that he stands committed until discharged according to law. Counts #1 & #4 to be served concurrently and a $3,000.00 Fine on each Count, #1 & #4 and Count #5 to be served consecutively to Counts #1 & #4.

ENTRY IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO FILED NOVEMBER 5, 1969

This day this cause came on for hearing upon the motion of the defendant for a rehearing and the Court,

being fully advised in the premises, finds said motion not to be well taken and hereby overrules the same.

To all of which defendant saves his exceptions.

ENTRY IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO FILED SEPTEMBER 19, 1969

This day this cause came on for hearing upon the motion of the defendant to quash a search warrant in the instant cause and to suppress certain evidence and the Court being fully advised in the premises finds said motion not to be well taken and hereby overrules the same.

To all of which defendant saves his exceptions.

DECISION IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO RENDERED SEPTEMBER 12, 1969

The defendant has moved the Court to quash the search warrant and to supress all evidence found during the search made by members of the Columbus Police Department, on January 13, 1969 at 1336 Ellsworth Avenue, Columbus, Ohio, for the reason that the search was illegal and was made in violation of defendant's rights under the 4th and 14th Amendments to the Constitution of the United States. Defendant requested an oral hearing, which was held before this Court.

The affidavit upon which the search was made includes the following statement:

> "The facts upon which such belief is based are as follows: this residence is occupied by Benny Danner, who has a prior narcotic conviction, and at least six reliable informants have informed Officers Dempsey and Weatherman that Mr. Danner is selling narcotics from this residence and is the largest dealer in narcotics in this area. These Officers have seen auto-

> mobiles belonging to A. C. Russell, Al Smith, Leroy Cook, Ernest Lee Felder in this immediate vicinity this evening, and reliable informants have informed this affiant that these persons are selling narcotics for Benny Danner. A neighbor of Mr. Danner has informed Officer Weatherman that persons were frequenting the premises in automobiles which checked out to be owned by known narcotic users or pushers. Some of these same automobiles were in front of this residence at 8:30 P.M. this date.
>
> James Dempsey
> Police Officer."

In the case of *Spinelli vs. United States*, 37 L.W. 4110 at page 4113, Justice Harlan wrote:

> "* * * In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U.S. 102, 108 (1964); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U.S. 257, 270-271 (1960). * * *"

It is this Court's finding that such requirements were met by allegations of the affidavit in this case. Further, the Court finds, upon oral hearing, that there was not a failure of compliance by the searching officers with the requirement of notice of authority and purpose before entry into the premises. Moreover, the testimony indicates that there was an awareness by the occupants of

police officers. The Court notes Henry B. Rothblatt Handbook of Evidence for Criminal Trials, page 40, on that issue.

Defendant's motion to suppress is, therefore, overruled.

/s/ ARCHER E. REILLY, *Judge*

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 2933.23, Ohio Revised Code: **Affidavit for search warrant.**

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Section 2933.24, Ohio Revised Code: **Contents of search warrants.**

A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for

a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

Section 3719.09, Ohio Revised Code: **Possession.**

No person . . . shall have in his possession or under his control any narcotic drug or narcotic drug preparation unless such drug is exempted . . .

Section 3719.101, Ohio Revised Code: **Prohibited use of buildings or vehicles.**

No person shall knowingly permit the use of any store, shop, warehouse, dwelling house, vehicle, boat, aircraft, or any other place whatever owned or controlled by him for the illegal keeping, dispensing, or administering of narcotic drugs.

Section 3719.20, Ohio Revised Code: **Prohibitions.**

No person shall:

* * *

(H) Conspire with another person or persons to violate section 3719.09 . . . or section 3719.101 of the Revised Code . . :

Section 3719.99, Ohio Revised Code: **Penalties.**

* * *

(C) Whoever violates section 3719.09, 3719.101 . . . of the Revised Code shall be fined not more than ten thousand dollars and imprisoned not less than two nor more than fifteen years for a first offense . . .

(D) Whoever violates division . . . (H) of section 3719.20 . . . of the Revised Code shall be imprisoned not less than ten nor more than twenty years for the first offense . . .

* * *

(N) . . .

No person convicted of violating division (H) of section 3719.20 of the Revised Code shall have benefit of probation.

United States Constitution, Amendments IV, V and XIV

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Amendment XIV

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .